

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Leanne Fornelli	Team: Squad #8	CCRB Case #: 201411852	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input checked="" type="checkbox"/> Injury
Incident Date(s) Saturday, 11/22/2014 4:55 PM	Location of Incident: West 79th Street and Amsterdam Avenue	Precinct: 20	18 Mo. SOL 5/22/2016	EO SOL 5/22/2016	
Date/Time CV Reported Mon, 11/24/2014 9:42 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 11/24/2014 9:42 AM		
Complainant/Victim	Type	Home Address			
Witness(es)	Home Address				
Subject Officer(s)	Shield	TaxID	Command		
1. DTS Nellie Malave	06977	924114	020 PCT		
Witness Officer(s)	Shield No	Tax No	Cmd Name		
1. POF Sumay Lee	20556	952976	020 PCT		
2. POM Jonathan Bisland	27265	932333	020 PCT		
Officer(s)	Allegation			Investigator Recommendation	
A.DTS Nellie Malave	Force: Det. Nellie Malave used pepper spray against § 87(2)(b)				

Case Summary

On November 22, 2014, at 4:55 p.m. (the time was determined by the NYPD event generated for the incident; encl. 12a-12k), at West 79th Street and Amsterdam Avenue in Manhattan, Det. Nellie Malave of the 20th Precinct stopped the vehicle occupied by § 87(2)(b) for improper cellphone use while driving. Det. Malave used pepper spray against § 87(2)(b) (**Allegation A**) for which he was taken to § 87(2)(b) (see Privileged Information folder) while in police custody. He was later released from the 20th Precinct stationhouse with Summons § 87(2)(b) (encl. 8f-8g) for § 87(2)(b) and a desk appearance ticket (encl. 8k) for § 87(2)(b).

Mediation, Notice of Claim and Criminal Histories

- This case was ineligible for mediation given the personal injury § 87(2)(b) sustained during the incident from the pepper spray for which he was hospitalized (see Privileged Information folder).
- This report has been submitted pending a FOIL request filed on February 23, 2015, for any notice of claim filed in regard to the incident (encl. 16i).

• [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

• [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Civilian and Officer CCRB Histories

- This is the first CCRB complaint filed by § 87(2)(b) (encl. 3a)
- Det. Malave (encl. 2a) has been a member of the service for fifteen years and has had filed against her seven other CCRB allegations, none of which were substantiated and four of which were under the category of force.

Additional Witness

Attempts were made to collect a verified interview from § 87(2)(b) who was the front passenger in § 87(2)(b)'s car at the time of the incident, but he was uncooperative.

Investigative Finding and Recommendation

Explanation of Subject Officer Identification

Det. Malave acknowledged her participation in this incident.

Allegation A: Force: Det. Nellie Malave used pepper spray against § 87(2)(b)

It is undisputed that Det. Malave (§ 87(2)(b)) -old Hispanic female who stands 5'3" tall, weighs 150 pounds, has graying black hair and brown eyes) used pepper spray against § 87(2)(b) (§ 87(2)(b)) year-old male who stands 6'3" tall, weighs 180 pounds, has gray hair and brown eyes), § 87(2)(g) § 87(2)(b) (encl. 5a-5g) said that Det. Malave, who worked alone, pulled him over for speaking on a cellphone, although he was using a hands-free device that was attached to his sun visor. In his original statement (encl. 4a-4c), he said that he was using a hands-free device, but had been pulled over for an unspecified traffic infraction for which he was in the wrong. After Det. Malave went to her patrol car with his documentation, he exited the driver's seat and opened the rear passenger door to retrieve a flashlight so that he could show her the hands-free device on the visor when she returned to his car. Before he could retrieve the flashlight, Det. Malave instructed him over the loudspeaker to reenter his car and he complied immediately. After Det. Malave gave him the summons, she walked toward her patrol car, which

was parked directly behind § 87(2)(b)'s car. § 87(2)(b) exited his car with the hands-free device in his right hand to show it to her. He never threatened her in any way, nor did he attempt to strike or swing at her. He took a step or two toward Det. Malave, who was about eight feet away and began to speak. Det. Malave, without saying anything or issuing any warning or instruction, ran and lunged toward him. She then jumped up, as she is short in stature, and pepper sprayed him from about six inches away for three to five seconds.

In § 87(2)(b)'s phone statement (encl. 6a), he corroborated § 87(2)(b)'s version of the events, except he said that § 87(2)(b) went to his backseat to retrieve his jacket and other unspecified items. He said that § 87(2)(b) never swore at or threatened Det. Malave. When § 87(2)(b) exited the car the second time with his hands-free device, he and Det. Malave were out of § 87(2)(b)'s view and behind him. Thirty seconds later, he heard § 87(2)(b) screaming, "My eyes! My eyes!" before he turned and saw him staggering toward the car.

§ 87(2)(b) (encl. 7a-7g) was an independent witness to this incident who was passing by when it occurred. She provided her contact information at the conclusion of the incident to § 87(2)(b) who provided it to § 87(2)(b) who in turn provided it to the CCRB. As § 87(2)(b) passed by and from across the street, she saw that a car stop was occurring, but it did not appear to be a major situation. An elderly male, § 87(2)(b) exited his driver's door. He held what appeared to be a cellphone (described as a flat, digital device with a glowing screen) in his left hand as he pointed to it with his right hand. The object was clearly not a weapon and § 87(2)(b) did not hold it as one. § 87(2)(b) and Det. Malave walked toward each other from about a couple feet away. § 87(2)(b) walked at a normal pace without trepidation and was not aggressive. He had an informing demeanor as if he wanted to clarify something. Det. Malave's demeanor was decisive and aggressive, as if § 87(2)(b) did something she told him not to do or had previously threatened her. § 87(2)(b) did not say anything threatening, curse or make any threatening gesture. § 87(2)(b) did not hear Det. Malave issue any instruction or say anything, but she was not paying attention to this so it was possible. When Det. Malave and § 87(2)(b) reached each other, Det. Malave pulled down § 87(2)(b)'s hand that had the device and pepper sprayed § 87(2)(b) directly in the face from about four inches to a foot away. § 87(2)(b) did not speak to any officer at the scene because she was afraid to do so.

Det. Malave (encl. 8l-8o), who worked alone, said at the time of the car stop, § 87(2)(b) acknowledged not using a hands-free device. When she went back to the patrol car to write the summons, § 87(2)(b) exited his car, but was compliant in reentering when she went over the loudspeaker a second time and told him to do so. He disregarded a first instruction over the loudspeaker, which was issued seconds before. When Det. Malave approached § 87(2)(b)'s car to hand him the summons, he began cursing at her. He said, "You are going to fucking listen to me," and other profanities she could not recall. After trying to hand § 87(2)(b) the summons twice, he refused to take it, so she laid it on the dashboard and walked back toward her patrol car. § 87(2)(b) was considered free to go. Fifteen to twenty seconds later, when Det. Malave was at the driver's door of the patrol car, § 87(2)(b) exited his car and she was immediately aware of this and turned around. § 87(2)(b) held nothing in his hands as he quickly walked toward her. He towered over her while cursing and pointing at her with his right hand. He yelled, "You're going to fucking listen to me," but she was unaware of anything else he said. She instructed him to step back and placed one hand on his waist to push him back, but she ended up taking a step back. § 87(2)(b) disregarded the instruction and took another step forward. Det. Malave repeated the instruction and repeated the movement of trying to push him back, but again ended up taking a step back. When § 87(2)(b) took a third step toward her, she retrieved her O.C. (Oleoresin Capsicum) spray and sprayed it once at § 87(2)(b) from an arm's length away. She did this because § 87(2)(b) was cursing, and although he never swung

or struck her, she felt this was imminent. § 87(2)(b)'s threatening demeanor was the only reason she used her O.C. spray against him. In Det. Malave's interview, she viewed a photograph of § 87(2)(b) and identified her as an individual who stood across the street after § 87(2)(b) was pepper sprayed, called Det. Malave a "bitch," and asked, "Why the fuck did you mace him?"

In the report for Arrest § 87(2)(b) (encl. 8h-8j), Det. Malave provided the following narrative: § 87(2)(b) was observed on a cellphone while operating a motor vehicle. A car stop was conducted and Det. Malave explained the reason for the stop and asked for § 87(2)(b)'s driver's license. As she wrote the summons, he exited his vehicle. She went over the microphone and instructed him to reenter. He continued with his motion to open the rear passenger door. She repeated the instruction and he reentered the driver's seat. When she approached the vehicle to deliver the summons, he refused to take it and said that she was going to listen to him. She again attempted to hand him the summons and he refused and repeated that she was going to listen to him. She placed the summons and license on the dashboard and attempted to return to her patrol car. As she walked away, he exited the car and quickly advanced upon her. He said, "You are fucking going to listen to me." She instructed him to reenter the car. He yelled, "No, you are going to fucking listen to me," while directly in front of and towering over her. She placed her hand on his waist and instructed him to step back. He said no and continued advancing toward her while yelling. She again put her hand on his waist and instructed him to step back as she tried to step back. He again advanced toward her while towering over and yelling at her. She "maced" him and attempted to handcuff him. He began to flail his arms and resist arrest.

PO Lee (encl. 9d-9f) was one of the backup officers to arrive to the scene when Det. Malave was handcuffing § 87(2)(b). She observed no bystander speaking to officers or protesting what was occurring. PO Bisland (encl. 10e-10f) was also one of the backup officers to arrive to the scene, but never exited his car as many officers were already present. He did not witness any bystander cursing at an officer.

The use of O.C. pepper spray constitutes physical force and may be used for self-defense, Patrol Guide Procedure 212-95 (encl. 1a-1d). An officer may only use that amount of force necessary to overcome resistance, Patrol Guide Procedure 203-11 (encl. 1e-1f).

§ 87(2)(g)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Investigator: _____
Signature Print Date

Supervisor: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date